



Legal Framework of the Plan

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The legal framework of the Plan consists primarily of laws and regulations that apply to a) commercial timber operations in California, b) the protection of listed species, and c) the protection of riparian habitat and streambeds.

A. Commercial Timber Operations

Commercial timber operations in California are governed by the Z'berg-Nejedly Forest Practices Act (FPA) of 1973 as implemented through Forest Practice Rules (FPRs) promulgated by the Board of Forestry and administered by the California Department of Forestry and Fire Protection (CDF). The California Timber Productivity Act (TPA) also is part of the general body of law applicable to timber harvesting and hence is relevant to the Plan.

1. California Forest Practices Act

The Z'berg-Nejedly State FPA, Public Resources Code (PRC) §§ 4511 et seq. was adopted in 1973. In PRC § 4512 the Legislature made findings and declarations that balanced “the public’s need for timber and other products” and various watershed, environmental values and protection of private property interests. Section 4513 articulated legislative intent at that time:

“It is the intent of the Legislature to create and maintain an effective and comprehensive system of regulation and use of all timberlands so as to assure that:

(a) Where feasible, the productivity of timberlands is restored, enhanced, and maintained.

(b) The goal of maximum sustained production of high-quality timber products is achieved while giving consideration to values relating to recreation, watershed, wildlife, range and forage, fisheries, and aesthetic enjoyment.”

In 1989 “regional economic vitality, employment,” was added, in (b), to the values to be given “consideration” while maximizing sustained production of high quality timber products.

2. California Timber Productivity Act

The TPA was adopted in 1982 (Government Code §§ 51100 et seq.). This Act followed hard on the heels of the acrimonious redwood park debate, which resulted in adding many thousands of acres of privately owned virgin redwood lands to the national park system over the protest of workers and timberland owners in northern California. The TPA amended legislation adopted in 1975 to change the method of taxing timber from an *ad valorem* basis to a severance tax basis. Its principle purpose, to keep privately owned timberland devoted to the growing and harvesting of timber, and out of intensive development, is reflected in §§ 51101 and 51102 of the

Government Code. All privately owned lands that will meet certain, minimal standards of timber productivity are mandatorily zoned as Timber Production Zone (“TPZ”) “to restrict their use to growing and harvesting timber and to compatible uses.” (Government Code § 51115.) All of PALCO’s timberlands are so designated. Compatible uses are defined as “any use,” including “management for fish and wildlife habitat,” “which does not significantly detract from the use of the property for, or inhibit, growing and harvesting timber . . .” (Government Code § 51104(h).) The trade-off for this highly restrictive zoning is that, supposedly, TPZ land can be utilized for growing and harvesting timber free from other constraints. This trade-off is reflected in several sections of the TPA:

Section 51102(b) provides:

“The Legislature further declares that it is the policy of this state that timber operations conducted in a manner consistent with forest practice rules adopted by the state Board of Forestry shall not be or become restricted or prohibited due to any land use in or around the locality of those operations.”

Section 51115.1(a) states that:

“The zoning of a parcel pursuant to this chapter shall give rise to a presumption that timber operations . . . may reasonably be expected to and will occur on that parcel.”

Section 51115.5(a) provides:

“Notwithstanding any other provision of law, timber operations conducted within a timber production zone pursuant to the provisions of the . . . [FPA] shall not constitute a nuisance, private or public.”

Clearly the TPA is a part of the general body of law applicable to timber harvesting that must be considered when interpreting any state statutory provision governing this land use.

3. *California Forest Practice Rules*

The FPRs impose three levels of planning and environmental review on timber operations in California.

a. Scoping of Issues and Adoption of Rules

The first level of planning and environmental review entails the Board of Forestry’s and CDF’s consideration of environmental issues common to timber operations. This process involves:

- Continuous scoping of environmental issues,
- Review of significant environmental issues by interdisciplinary task forces appointed by the Board, and
- Development and adoption of regulations to avoid or mitigate potentially significant impacts on specific resources.

b. Timber Harvesting Plans

The second level of planning and review entails the preparation, review, and approval of THPs for areas proposed for harvest. A THP is a three-year plan for the harvesting of commercial timberlands. It must be prepared by a registered professional forester licensed by the state of California. Each THP must include:

1. Maps and a detailed description of the stands that will be harvested,
2. A description of the silvicultural methods that will be applied,
3. Maps showing the location of any fish-bearing and non-fish-bearing watercourses in the plan area, and a description of the measures that will be implemented to protect those resources;
4. Maps showing the location of other sensitive resources, and a description of site specific provisions for protection of those resources;
5. The dates when the timber operations will begin and end; and
6. Any other information that may be required by the Board.

Each THP is submitted to CDF and reviewed by an interdisciplinary review team composed of representatives from CDF, California Department of Fish and Game (CDFG), and the Regional Water Quality Control Board. Representatives of other agencies may participate, as appropriate, at the request of CDF. In most cases, a pre-harvest inspection of the plan area is conducted in the field by CDF and interested members of the review team. As part of the approval process, adjacent neighbors and downstream water users must be notified, and a Notice of Intent to Harvest Timber must be physically posted or published in a local newspaper. The public can comment on the THP during the review process. No harvesting may occur until the THP for the site is approved, and THP approval requires a determination by CDF's Director that all significant adverse impacts, including cumulative effects, have been avoided or mitigated to a level of insignificance.

c. Long-Range Planning for Sustained Timber Production

The third level of planning and review involves establishing a long-term sustained yield (LTSY) harvest level for commercial timber operations. The type of planning required depends on the size the timber operation. In PALCO's case, the FPRs require preparation of a Sustained Yield Plan (SYP).

An SYP supplements the THP process by providing a means for addressing long-term issues of sustained timber production and analyzing environmental effects on a landscape scale. It examines projected operations and potential effects over a 100-year or longer planning period and entails three inter-related assessments:

1. A watershed assessment that:
 - Delineates and describes current conditions within watersheds that include the ownership and/or are affected by activities on the ownership;
 - Analyzes the potential for significant adverse impacts from planned operations on public trust resources within watersheds; and

- Identifies feasible measures that would avoid or mitigate such impacts.
2. A fish and wildlife assessment that:
- Identifies the listed and other sensitive species associated with the habitats on the ownership;
 - Examines the potential effects of timber growth and harvest on such species and on the availability, configuration, and distribution of their habitats; and
 - Identifies feasible measures that would avoid or mitigate potentially significant adverse impacts from planned operations.
3. A sustained timber production assessment that:
- Projects timber growth and harvest on the ownership in ten-year intervals over a 100-year planning period;
 - Establishes a long-term sustained yield (LTSY) harvest level for the ownership that takes into account environmental and economic considerations;
 - Demonstrates that the average annual harvest over any rolling 10-year period will not exceed the LTSY harvest level; and
 - Demonstrates that the projected inventory is capable of sustaining the LTSY harvest level in the last decade of the planning horizon.

In addition to the assessments, the SYP must include provisions for documenting the implementation and evaluating the efficacy of the proposed measures.

B. Protection of Listed Species

With regard to protection of listed species and other fish and wildlife resources, the legal framework of the Plan is based on the federal Endangered Species Act (ESA) and the California Fish and Game Code (including the California Endangered Species Act (CESA), Natural Community Conservation Planning (NCCP) Act, and Fish and Game Code §1603).

1. Federal ESA

A primary purpose of the federal ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." (16 U.S.C. § 1531(b)). To achieve that goal, the ESA provides a means for listing species as threatened or endangered (listed species), and prohibits the "take" of listed species. As defined in the ESA, "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. § 1532(19)). Federal regulations further define "harm" and "harass" as follows.

"Harm" means an act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3).

"Harass" means an intentional or negligent act or omission which creates the likelihood of injuring wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering (50 CFR 17.3).

The ESA also contains provisions for authorizing take of listed species if such taking is incidental to, and not the purpose of, an otherwise lawful activity (16 U.S.C. § 1539(a)(1)(B)). These provisions include those in Section 10(a) of the ESA, which authorizes the Secretaries of Interior and Commerce to allow incidental take and specifies approval criteria for incidental take permits (ITPs).

As stated in Section 10(a) and accompanying federal regulations, an HCP is a mandatory component of an ITP application and must specify:

1. The species that will be taken;
2. The impacts likely to result from the contemplated taking;
3. Alternatives to the taking considered by the applicant and the reasons why the alternatives were not employed;
4. Measures the applicant will implement to minimize and mitigate the impacts of take;
5. Assurances that adequate funding is available for implementation of the HCP;
6. Provisions for responding to changed and unforeseen circumstances; and
7. Other measures (if any) required by the approving agency (USFWS or NMFS) as being necessary or appropriate for the purposes of the HCP.

Applications are submitted to USFWS and/or NMFS as appropriate. After a public comment period, the ITP must be issued if it is found that:

1. The taking will be incidental to an otherwise lawful activity;
2. The impacts of the taking will be minimized and mitigated to the maximum extent practicable;
3. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
4. The approving agency is assured that adequate funding is available for plan implementation and that the HCP will be implemented, including any additional measures required as a condition of permit approval and provisions for responding to changed or unforeseen circumstances.

This Plan includes the information, assessments, assurances, and measures required to meet the approval criteria for ITPs.

2. California Fish and Game Code

a. CESA

CESA provides for the listing of species as threatened or endangered; prohibits take of listed species and candidate species for listing; and authorize CDFG to approve ITPs (Cal. Fish & Game Code § 2050 et seq.). "Take" is defined in state law as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill" (Cal. Fish & Game Code § 86). Statutory authority for ITPs under state law was clarified by legislation in an amendment to Section 2081 of the state ESA. The statute, which took effect in January 1998, allows CDFG to issue an ITP if the agency finds:

1. The take will be incidental to an otherwise lawful activity;
2. The impacts of the authorized take will be minimized and "fully mitigated";
3. The ITP is consistent with CDFG regulations (which have yet to be adopted); and
4. The applicant has ensured adequate funding to implement the minimization and mitigation measures and for monitoring compliance with, and effectiveness of, those measures.

No ITP may be issued if issuance of the permit "would jeopardize the continued existence of the species" (Cal. Fish & Game Code § 2081 (c)).

The statute also imposes important limitations on measures to minimize and "fully mitigate" the impacts of the taking (Cal. Fish & Game Code § 2081 (b)(2)):

1. The measures must be "roughly proportional" in extent to the impact of the authorized taking on the species;
2. Where various measures are available to meet the minimization and full mitigation obligation, the measures required by CDFG must maintain the applicant's objectives to the greatest extent possible (Cal. Fish & Game Code § 2081 (b)(2)); and
3. All required measures must be capable of successful implementation (Cal. Fish & Game Code § 2081 (b)(2)).

b. NCCP Act

The NCCP program was established by the California legislature in 1991 when Sections 2800 et seq. were added to the California Fish and Game Code. In general, the purpose of the NCCP program is to provide long-term regional protection of natural vegetation and wildlife while allowing compatible land uses and appropriate development and growth. As described by the California Resources Agency when the program was initiated:

Experience over the 20-year live of the federal ESA has shown that the results of listing species individually as threatened or endangered under the ESA often does not achieve its objectives. Such listings—despite extensive regulatory powers available under the law—do not necessarily assure the long-term survival of the species and can have serious economic consequences in affected regions. . . . The NCCP program is an innovative State effort to protect critical habitat . . . before it become so fragmented or degraded by development and other use that a listing of individual species as threatened or endangered is required under the State or federal ESA. The

program is designed to save critical habitat and, at the same time, allow for reasonable economic activity and development on affected land, much of which is privately-owned. (excerpted from Resources Bulletin "Natural Communities Conservation Planning: Questions and Answers.")

As stated in the planning and conservation guidelines for the first NCCP program implemented under the Act (i.e., the coastal sage scrub program in southern California), the NCCP process is designed to:

- Promote coordination and cooperation among public agencies, landowners, and other private interests;
- Provide a mechanism whereby landowners and development proponents can effectively participate in the resource conservation process;
- Provide a regional planning focus which can effectively address cumulative impact concerns, minimize habitat fragmentation, and promote multiple species management and conservation;
- Provide an option for identifying and ensuring appropriate mitigation for impacts on fish and wildlife;
- Promote the conservation of broad-based natural communities and species diversity; and
- Provide for efficient use and protection of natural and economic resources while promoting greater public awareness of important elements of the state's critical resources.

With regard to the coastal redwood forest community, on PALCO lands, this Plan qualifies as a NCCP plan. The approximately 211,000 acres of PALCO land addressed by this Plan constitutes a regional planning focus and provides for the conservation and management of the natural communities and species diversity on those lands.

c. Protection of Riparian Habitat and Streambeds

Sections 1600-1603 of the California Fish and Game Code regulate all diversions or obstructions of the natural flow or substantial changes to the bed, channel, or bank of any river, stream, or lake in California that supports fish or wildlife. "Stream" is defined in CDFG regulations as:

a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes watercourses having surface or subsurface flow that supports or has supported riparian vegetation.

Under state law, CDFG must be contacted for a streambed alteration agreement for any project that may impact a streambed or wetland. Public agency projects are addressed under Section 1601 of the Code; private sector projects are addressed under Section 1603.

This Plan examines potential impacts to stream and riparian habitats from PALCO activities and identifies measures to avoid, minimize, and mitigate the effects. Based on the measures in the Plan, PALCO is seeking a rolling five-year streambed alteration agreement with CDFG.